FILED
SEP 27 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE COMPANY, Petitioners

v.

UNITED STATES OF AMERICA, ADA BOTTONE, FLEETWOOD PAVING CORPORATION, and COLONIAL SAND AND STONE CO., INC.

COLONIAL SAND AND STONE CO., INC., Petitioners

v.

UNITED STATES OF AMERICA, ADA C. BOTTONE, doing business as MARIO'S MIRAMARE RESTAURANT,

FLEETWOOD PAVING CORPORATION, ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE CO.

PETITIONERS' REPLY BRIEF TO UNITED STATES BRIEF IN OPPOSITION

CHARLES S. FRIEDMAN,
Attorney for Petitioners,
Aquilino & Spero,
10 Fiske Place,
Mount Vernon, N. Y.

JACOB I. GOODSTEIN,
Attorney for Petitioner,
Colonial Sand & Stone Co., Inc.,
21 East 40th Street,
New York, N. Y.

HAROLD M. EDWARDS,
KENNETH J. BRESKIN,
Of Counsel.

COPY BOUND CLOSE IN CENTER

INDEX

PAGE

POINT I 1

POINT II 4

CASES CITED

Amer. v. Superior Court, 344 U. S. 813 6

Busey v. District of Columbia, 319 U. S. 579 6

Cranford Co. v. L. Leopold & Co., 189 Misc. 388, 391-392, 70 N.Y.S. 2d 183, 185-186, affirmed 273 App. Div. 754, 75 N.Y.S. 2d 512, affirmed 298 N. Y. 676, 82 N. E. 2d 580 5

Fidelity and Deposit Co. of Maryland v. New York City Housing Authority, 2 Cir., 241 F. 2d 142 ...1, 3, 4

United States v. Bess, Nos. 395 and 410, 1957 Term, decided June 9, 1958 ..... 5, 6

United States v. Durham Lumber Co., No. 7619, decided July 18, 1958 2

Wickes Boiler Co. Inc. v. Godfrey-Keeler Co., 121 F. 2d 415 (reversing 116 F. 2d 842), certiorari denied, 314 U. S. 686 2

STATUTE CITED

Section 3670 of the Internal Revenue Code of 1939 .. 4, 5

COPY BOUND CLOSE IN CENTER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1099

ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE COMPANY, Petitioners

v.

UNITED STATES OF AMERICA, ADA BOTTONE, FLEETWOOD PAVING CORPORATION, and COLONIAL SAND AND STONE CO., INC.

COLONIAL SAND AND STONE CO., INC., Petitioners,

v.

UNITED STATES OF AMERICA, ADA C. BOTTONE, doing business as MARIO'S MIRAMARE RESTAURANT,

FLEETWOOD PAVING CORPORATION, ROBERT AQUILINO and JOSEPH SPERO, doing business as HOME MAINTENANCE CO.

PETITIONERS' REPLY BRIEF TO UNITED STATES BRIEF IN OPPOSITION

Point I

In our petition we pointed out that the case at bar conflicted in principle with the decision of the Second Circuit in *Fidelity Deposit Co. of Maryland* v. *New York Housing Authority*, 241 F. 2d 142, and conflicted directly with another Second Circuit decision construing the term

"property" as used in the Bankruptcy Act, *Wickes Boiler Co. Inc.* v. *Godfrey-Keeler Co.*, 121 F. 2d 415 (reversing 116 F. 2d 842) certiorari denied, 314 U. S. 686. Since the filing of our petition, the Court of Appeals for the Fourth Circuit rendered its decision in *United States* v. *Durham Lumber Co.*, No. 7619, decided July 18, 1958, which presents a square conflict with the instant case under the identical federal statute involved here.

The *Durham Lumber* case, as the instant case, involved a contest between the Government and subcontractors over a fund, in the hands of an owner, payable for the improvement of the owner's real property. There, as here, the Government asserted its tax lien against the earned fund as constituting "property and rights to property" belonging to the general contractor. The subcontractors, resisting this contention, asserted their property right in the earned fund, by virtue of their rights thereto under North Carolina law. The crucial provisions of the North Carolina law give the subcontractor a priority and lien on the owner's property which can be enforced by the subcontractor directly against the owner. Moreover, the owner is required to pay directly to the subcontractor all sums due him by the general contractor. It will be seen that this statutory scheme, although different in mechanics of operation, does not differ in substance from the New York law, which permits the subcontractor to enforce his right to payment directly against the owner by instituting an action to enforce his beneficial interest in the trust composed of the debt due from the owner. Moreover, payments due the subcontractor are made by the owner to the subcontractor by constituting the general contractor a trustee of these payments for the benefit of the subcontractor.

The Fourth Circuit held that under North Carolina law the subcontractors' claims are preferred to that of the general contractor; "[T]heirs [the subcontractors'] is a valuable right which is not extinguished by the tax lien

COPY BOUND CLOSE IN CENTER

on the property of the general contractor, whose only claim against the owners under the laws of North Carolina is for so much of the construction price as will remain unpaid after the owners have deducted a sum sufficient to pay the subcontractors." Stated differently, the court held that the only portion of the "earned fund" in the hands of the owner which constitutes "property and rights to property" of the general contractor, and is therefore reachable by the tax lien, is the amount over and above that due the subcontractors.

Of the case at bar, the Fourth Circuit had this to say:

> "In *Aquilino* v. *United States,* 3 N. Y. 2d 511, 146 N. E. 2d 774, the New York Court of Appeals reached a conclusion apparently at variance with our own. The opinion indicates no awareness of the decision in the *Fidelity and Deposit* case,[1] * * *. Had the New York Court of Appeals been informed of the decision of the Court of Appeals for the Second Circuit in *Fidelity and Deposit,* indeed had it felt at liberty to accord full recognition to the state-created right of the subcontractor against the owner, it may have reached a different conclusion.
>
> That the Court of Appeals of New York should have accorded greater recognition to the state created rights is strongly indicated by the very recent case of *United States* v. *Bess,* ——U. S. ——, —— S. Ct. ——, —— L. Ed. —— (decided June 9, 1958) in which it was held that the tax lien could attach only to such rights as had been created and limited by state law. Section 3670, it was said, merely attaches federally defined

[1] The uncorrected opinion of the New York Court of Appeals, which receives a limited circulation, indeed made no reference to *Fidelity and Deposit.* Apparently it was this opinion to which the Fourth Circuit here referred. The final version of the New York court's opinion in Aquilino was identical with the uncorrected opinion except for the insertion of "*cf. Fidelity and Deposit Co. of Maryland v. New York City Housing Authority,* 2 Cir., 241 F. 2d 142, 144-145."

consequences to state created rights. In stating the proposition, the Supreme Court cited with approval the decision of the Court of Appeals for the Second Circuit in *Fidelity and Deposit, supra.* Had the New York Court of Appeals adopted the same approach in *Aquilino,* it hardly could have avoided the conclusion that where the state created right of the general contractor was at all times secondary and subordinate the attachment of the tax lien does not elevate it to a status of primacy and preference."

Point II

In its brief in opposition, the Government has chosen not to consider petitioners' case on the merits. It has failed to discuss the question presented by the petition, namely, whether the taxpayer's interest as trustee in the statutory trust created by New York amounts to "property" or "rights to property"[2] under *federal law.* Instead the Government suggests that the New York court has disposed of this case on the basis of *state law,* and that therefore no proper federal question is presented to this Court. The Government contends that instead of construing the trust fund provisions as a true trust, "the [New York] court construed the New York Lien Law [containing the trust fund provisions] as simply establishing a rule of priority * * *" (Br. in Opp. 6). *This is simply not so,* as a reading of the Court of Appeals decision will show. Nowhere does the New York court suggest that these trust fund provisions simply establish a rule of priority.

Rather, the Court of Appeals decision is based squarely on federal decisions. Said the New York Court of Appeals:

> "It is, by now, exceedingly well settled that no state-created rule may defeat the paramount right of

[2] Section 3670 of the Internal Revenue Code of 1939.

COPY BOUND CLOSE IN CENTER

> the United States to levy and collect taxes uniformly throughout the land [citing six federal decisions]. That being so, it follows that the provision of this state's Lien Law, to which respondents point—that funds received by a contractor from the owner for the improvement of real property shall be deemed 'trust funds for the payment of subcontractors' (Sec. 36-a; Sec. 13, subd. [7]—*may not be construed* to affect the rights of the government or the priority of its tax lien. (Emphasis supplied.) (Pet. App. 21-22)"

It is thus clear that the decision below is based on the court's belief that it did not have the power to construe the New York trust fund provisions, for the purpose of this federal law, as vesting the beneficial interest in the trust in petitioners here. If any further proof of this fact were needed, it may be found in a footnote to that portion of the decision quoted above in which the Court states that one of its own opinions[3] suggests a "contrary" construction, but "it must give way to more recent *federal decisions*" (Emphasis supplied.) (Pet. App. 22).

As we have demonstrated in our petition (Pet. 14, n. 12), the federal decisions on which the New York court relied are not applicable to the question of what constitutes "property and rights to property" under Section 3670 of the Internal Revenue Code of 1939. See *United States* v. *Bess*, Nos. 395 and 410, 1957 Term, decided June 9, 1958. The Supreme Court cases relied on by the New York court ruled that the question of when a state-created lien becomes perfected or choate is a question of federal law, regardless of whether or not the state considers it perfected. However, subsequent to the decision in the instant case, this Court ruled in *United States* v. *Bess, supra*, that

---

[3] *Cranford Co.* v. *L. Leopold & Co.*, 189 Misc. 388, 391-392, 70 N.Y.S. 2d 183, 185-186, affirmed 273 App. Div. 754, 75 N.Y.S. 2d 512, affirmed 298 N. Y. 676, 82 N. E. 2d 580.

the determination of what constitutes "property and rights to property" under federal law must be determined by reference to state law:

> "Sec. 3670 creates no property rights but merely attaches consequences, federally defined, to rights created under state law." (*United States* v. *Bess, supra*)

Point III

In view of these subsequent decisions and in view of the fact that the Government apparently now agrees that if New York created a true trust by this statute, then the taxpayer has no "property" interest in the fund under federal law, the Court may wish, as an alternative simply to granting the writ, to vacate the judgment and remand the case to the New York Court of Appeals for reconsideration in light of the *Bess* decision (cf. *Busey* v. *District of Columbia,* 319 U. S. 579; *Amer.* v. *Superior Court,* 344 U. S. 813).

Respectfully submitted,

CHARLES S. FRIEDMAN,
Attorney for Petitioners,
Aquilino & Spero.

JACOB I. GOODSTEIN,
Attorney for Petitioner,
Colonial Sand & Stone Co., Inc.

HAROLD M. EDWARDS,
KENNETH J. BRESKIN,
Of Counsel.